

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)	
FOR REVIEW BY:)	CHARGE NO.: 2009CA1747
JOYCE A. RILEY)	EEOC NO.: 21BA90637
)	ALS NO.: 10-0126
)	
Petitioner.)	

ORDER

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon Joyce A. Riley's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")^[1] of Charge No. 2009CA1747; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, WHEREFORE, it is hereby **ORDERED** that the Respondent's dismissal of the Petitioner's charge is **SUSTAINED** on the following grounds:

(A) The Respondent's dismissal of Counts A, B, C, E, F, G, H, and J of the Petitioner's charge are **SUSTAINED** for **LACK OF SUBSTANTIAL EVIDENCE**.

(B) The Respondent's dismissals of Counts D and I of the Petitioner's charge are **SUSTAINED** for **LACK OF JURISDICTION**.

In support of which determination the Commission states the following:

1. On December 10, 2008, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged that Allied Barton Security Services, LLC ("Employer") subjected her to unequal terms and conditions of employment from July 7, 2008 through August 18, 2008, because of her race, Black (Count A), age, 66 (Count B), sex, female (Count C), physical disability, Right Ankle Disorder (Count D), and in retaliation for having opposed unlawful discrimination (Count E); and that it discharged her on October 29, 2008, because of her race (Count F), age (Count G), sex (Count H), physical disability (Count I), and in retaliation for having opposed unlawful discrimination (Count J), in violation of Sections 2-102(A) and 6-101(A) of the Illinois Human Rights Act ("Act"). On January 19, 2010, the Respondent dismissed Counts A, B, C, E, F, G, H, and J of the Petitioner's charge for Lack of Substantial Evidence. On the same date the Respondent dismissed Counts D and I of the Petitioner's charge for Lack of Jurisdiction. On February 18, 2010 the Petitioner filed a timely Request.

^[1] In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."

2. The Petitioner was employed as a Security Officer. During all relevant times alleged, the Employer had in existence rules, outlined in its Employee Handbook, which provided that during business hours, the employee's usage of telephone or other communication devices were restricted to the Employer's business purposes.
3. The Employer also had in place a Rules/Standards of Conduct Policy which provided that if an employee directed inappropriate language or engaged in other inappropriate conduct toward the Employer's clients, the public, or fellow employees, the employee would be subject to discipline, up to and including discharge.
4. The Petitioner contends that from July 7, 2008, through August 18, 2008, the Employer would not allow her to make personal and/or emergency phone calls during work hours.
5. On May 23, 2008, the Petitioner wrote a letter to the Employer in which she stated her belief that she was being discriminated against.
6. On October 15, 2008, the Employer issued the Petitioner a written warning for taking a personal telephone call while on duty, and for leaving her post.
7. In October 2008, the Petitioner was providing security services for one of the Employer's clients.
8. On October 28, 2008, and on October 29, 2008, the Employer received complaints from visitors to the client's building that the Petitioner had been rude, abrasive, and condescending toward building visitors on October 28th.
9. On October 29th, the Employer, via its Account Manager, questioned the Petitioner about the October 28th incident, at which time the Petitioner denied any misconduct. The Account Manager reviewed a videotape of the Petitioner at her post on the date of the alleged incident.
10. On October 29, 2008, based on the visitor complaints and its review of the videotape, the Employer discharged the Petitioner.
11. The Petitioner alleged in her charge that the Employer had in fact subjected her to unequal treatment because of her race, age, sex, and disability, by denying her the use of the telephone. The Petitioner alleged that other employees outside of her protected classes were allowed to use the telephone during work hours for personal reasons. The Petitioner further alleged the Employer had discharged her because of her race, age, sex, and disability. Finally, the Petitioner alleged the Employer had retaliated against her for having opposed unlawful discrimination on May 23, 2008, through its alleged discriminatory enforcement of the telephone policy and when it discharged her.

12. The Petitioner attached a Medical Questionnaire completed by her physician.
13. Section 1-103(l)(1) of the Act defines “disability” as a... “determinable physical or mental characteristic of a person...” which is... “unrelated to a person’s ability to perform the duties of a particular job...” 775 ILCS 5/1-103(l)(1).
14. Section 2500.20(b)(1) of the Respondent’s Rules and Regulations further interpret a disability as excluding... “conditions that are transitory and insubstantial and conditions that are not significantly debilitating or disfiguring.” 56 Ill. Admin. Code, Ch. II, §2500.20(b)(1).
15. The physician’s returned Medical Questionnaire indicated that the Petitioner’s ankle disorder was transitory. For that reason, the Respondent dismissed Counts D and I of the charge for lack of jurisdiction based on the Respondent’s determination that the Petitioner’s condition did not qualify as a disability within the meaning of the Act. The Respondent dismissed the remaining Counts A, B, C, E, F, G, H, and J for lack of substantial evidence.
16. In her Request, the Petitioner argues that she was not allowed to receive phone calls from her doctor and lawyer, while other security guards were allowed to receive calls. The Petitioner further argues that in 12 years of working as a security guard she has never been given a written warning. She states that after she had engaged in protected activity, she was given a written warning. The Petitioner also denies having been rude to visitors on October 28, 2008, and states she was not permitted to view the videotape the Employer allegedly reviewed. The Petitioner contends she was not allowed to have a union representative present when the Employer questioned her about the incident of October 28, 2008.
17. In its Response, the Respondent requests that the Commission sustain its dismissal of Counts A, B, C, and E, of the Petitioner’s charge for lack of substantial evidence because the evidence was insufficient to establish *prima facie* cases of discrimination as to those Counts. As to Counts F, G, H, and J, the Respondent argues the dismissal should also be sustained for lack of substantial evidence because the Employer articulated a non-discriminatory reason for discharging the Petitioner, and there was no substantial evidence of pretext. Finally, the Respondent argues that its dismissal of Counts D and I should be sustained because the Petitioner failed to prove that she was disabled within the meaning of the Act.

Conclusion

- A. Counts A, B, C, and E: Unequal Terms and Condition Based on Race, Age, Sex, and Retaliation

The Commission concludes that the Respondent properly dismissed Counts A, B, C and E of the Petitioner's charge for lack of substantial evidence. If no substantial evidence of discrimination exists after the Respondent's investigation of a charge, the charge must be dismissed. See 775 ILCS 5/7A-102(D). Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

Generally, in order to establish a *prima facie* case of discrimination, the Petitioner must show: (1) that she falls within a protected class; (2) that she was performing her job satisfactorily; (3) that she was subjected to an adverse action; and (4) that the Employer treated similarly situated employee outside the Petitioner's protected class more favorably under similar circumstances. See Marinelli v. Human Rights Commission, 262 Ill.App.3d 247, 634 N.E.2d 463 (2nd Dist. 1994).

In order to establish a *prima facie* case of retaliation, the Petitioner must show: (1) that she engaged in a protected activity; (2) the Employer committed an adverse action against her; and (3) a causal connection existed between the protected activity and the adverse action. See Welch v. Hoeh, 314 Ill.App.3d 1027, 1035, 733 N.E.2d 410, 416 (3rd dist. 2000). The adverse action must be sufficiently severe or pervasive to constitute a term or condition of employment in order to give rise to a cause of action under the Act. See In the Matter of: Linda M. Hartman and City of Springfield Police Department, IHRC, Charge No. 1993SF0365 (October 4, 1999), 1999 WL 33252975 (Ill.Hum.Rts.Com.).

As to Counts A, B, and C, wherein the Petitioner alleges unequal terms and conditions due to her race, age, and sex, and specifically that similarly situated employees outside of her protected classes were permitted to make personal calls while on duty, the Commission finds the evidence insufficient to establish a *prima facie* case of discrimination. There has been no evidence submitted by the Petitioner, nor uncovered by the Respondent, to substantiate the Petitioner's claim that other security officers outside of her protected classes were permitted to make personal phone calls while on duty.

As to Count E, wherein the Petitioner alleged the Employer subjected her to unequal terms and conditions as retaliation for having complained to the Employer of discrimination, the Commission finds no evidence that the Petitioner was subjected to an adverse action. The Petitioner alleged her personal phone call usage was limited by the Employer in retaliation for having engaged in protected activity. However, it is uncontested that the Employer had in place a written policy which prohibited all of its employees from making personal phone calls while on duty. Furthermore, there was no evidence that the Employer had permitted similarly situated employees who had not engaged in protected activity to make personal phone calls while on duty. As such, there is no evidence to substantiate the Petitioner's claim of retaliation as alleged in Count E.

B. Counts F, G, H, and J: Discriminatory Discharge Due to Race, Age, Sex, and Retaliation

The Commission concludes that the Respondent also properly dismissed Counts F, G, H, and J of the Petitioner's charge for lack of substantial evidence.

As to Counts F, G, H, and J, assuming *arguendo* that the evidence presented establishes the existence of *prima facie* cases of discrimination and retaliation, the Employer articulated a non-discriminatory and non-retaliatory reason for discharging the Petitioner, which was that the Petitioner's conduct violated its Rules/Standards of Conduct Policy on October 28, 2008. There has been no evidence presented from which a reasonable mind could conclude this stated reason was a mere pretext for discrimination or retaliation.

The Respondent determined that the Employer had received a letter of complaint on October 28, 2008, from a guest of the Employer's client regarding the Petitioner's alleged conduct on October 28th.¹ Further, in the course of the Respondent's investigation, the Employer produced a statement from an individual who stated he had witnessed the Petitioner's alleged conduct on October 28th.² The fact that the Petitioner disputes that the October 28th incident occurred is not determinative. In the absence of any evidence that the business consideration relied upon by the Employer was a pretext for discrimination, it would be improper for the Commission to substitute its judgment for the Employer's business judgment. See Berry and State of Illinois, Department of Mental Health and Developmental Disabilities, IHRC, ALS No. S-9146 (December 10, 1997).

Given the evidence that the Employer had in fact received a complaint about the Petitioner's conduct on October 28th, and that this complaint was corroborated by a witness to the October 28th incident, the Employer had a good faith basis for its belief that the Petitioner had violated its Rules/Standards of Conduct Policy on October 28, 2008. Therefore, finding no evidence of pretext, the Commission concludes Counts F, G, H, and J of the charge were properly dismissed for lack of substantial evidence.

Counts D and I: Unequal Terms and Condition and Discriminatory Discharge Due to Disability

The Commission concludes that the Respondent properly dismissed Counts D and I of the Petitioner's charge for lack of jurisdiction because the Petitioner failed to prove that she was disabled within the meaning of the Act at the time the alleged civil rights violations occurred.

As stated earlier, conditions that are transitory and insubstantial are not considered disabilities within the meaning of the Act. See 56 Ill. Admin. Code, Ch. II, §2500.20(b)(1). According to the Petitioner's own physician, the Petitioner's ankle disorder was transitory. Therefore, because the Petitioner's ankle disorder did not fall within the definition of a disability under the Act, the

¹ The Respondent references the complaint letter as its Exhibit L in its Investigative Report.

² The Respondent references the witness's corroboration letter as its Exhibit M in its Investigative Report.

Respondent lacked jurisdiction to investigate her claims of disability discrimination as alleged in Counts D and I.

Accordingly, it is the Commission's decision that the Petitioner has not presented any evidence to show the Respondent's dismissal of her charge was not in accordance with the Act. The Petitioner's Request is not persuasive.

THEREFORE, IT IS HEREBY ORDERED THAT:

The dismissal of the Petitioner's charge is hereby **SUSTAINED**.

This is a final Order. A final Order may be appealed to the Appellate Court by filing a petition for review, naming the Illinois Human Rights Commission, the Illinois Department of Human Rights, and Allied Barton Security Services, LLC as Respondents, with the Clerk of the Appellate Court within 35 days after the date of service of this Order.

STATE OF ILLINOIS

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HUMAN RIGHTS COMMISSION

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Entered this 22nd day of September 2010

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini